IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0180
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
RODRICK WADE HIGH-ELK,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20052277

Honorable Charles S. Sabalos, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Kathryn A. Damstra
Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Frank P. Leto
Tucson
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Rodrick High-Elk was convicted of several offenses arising out of his flight from Pima County Sheriff's deputies. The trial court sentenced him to concurrent, presumptive, enhanced prison terms, the longest of which was 15.75 years. On appeal, he argues that two deputies testified in violation of a pretrial order, and that the evidence was insufficient to support his convictions for aggravated assault. Finding no reversible error, we affirm.

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions. *See State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). Sheriff's deputy Yazzie, responding to a call regarding a black Thunderbird, began to follow High-Elk's car because it matched the car described in the call. Yazzie eventually turned on the patrol car's lights and siren. High-Elk drove his car through a fence into a residential yard, turned around, and then accelerated toward Yazzie's patrol car and two other patrol cars that had arrived. High-Elk's car came within about six inches of hitting the driver's door of Yazzie's patrol car as it passed. High-Elk's car ended up in a ditch, and he then fled on foot; eventually he was apprehended with the aid of a police dog.

¶3 High-Elk was arrested, and a blood test showed his blood alcohol concentration was .122 within two hours of driving. Ultimately, High-Elk was convicted of three counts of aggravated assault with a dangerous instrument for assaulting the three deputies, one count each of aggravated driving under the influence of an intoxicant while his

license was suspended and aggravated driving with an alcohol concentration of .08 or more while his license was suspended, and one count of fleeing from a law enforcement vehicle.

¶4 High-Elk first argues the trial court erred by permitting two officers to testify regarding the type of call to which they were responding, in violation of the trial court's pretrial order.[1] Before trial, High-Elk filed a motion in limine to preclude "[a]ny reference to the underlying incident at the Circle K" that led deputies to pursue High-Elk. The state did not oppose the motion, and the trial court proposed that the deputies testify they had received a call "[f]rom a business establishment concerning the operation of a vehicle . . . on the roadway," to avoid the implication that "there [wa]s some other crime [High-Elk was] committing, that there [wa]s a robbery, that there [wa]s a theft, that there [wa]s something untoward about what [wa]s going on." High-Elk agreed with that proposal.

¶5 Yazzie testified, however, that he had "received a call of a hit and run" and that the vehicle referred to "was a hit-and-run vehicle." High-Elk moved for a mistrial, which the trial court denied. The state subsequently solicited testimony from Yazzie that there was no reason to believe High-Elk had been involved in a hit-and-run.

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[1]High-Elk asserts this deprived him of his right to a fair trial "in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article II, Sections 4 and 24 of the Arizona Constitution." But he cites no other authority in support of his constitutional argument, and the authorities he cites address the prejudicial impact of the admission of evidence of other acts of misconduct and the appropriate remedy. Accordingly, we conclude he has waived any constitutional argument by failing to develop it adequately. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi), 17 A.R.S.; *State v. Burdick*, 211 Ariz. 583, n.4, 125 P.3d 1039, 1042 n.4 (App. 2005).

¶6 The next day, Deputy Phaneuf testified that "Communications dispatched an accident at the Circle-K at Craycroft and I-10." Although High-Elk did not object, the state asked to "have just a minute with [its] witness," apparently to clarify the trial court's pretrial order. Later, Phaneuf testified that he had "previously overheard on the radio that the vehicle had been attempting to elude them and also attempted at one point, I believe—," at which point High-Elk objected on hearsay grounds. The trial court sustained the objection and granted High-Elk's motion to strike. It instructed the jury to disregard "[t]he testimony concerning a conversation that this witness overheard or any transmission over the radio that he heard."

¶7 High-Elk's argument on appeal is based on Rule 404(b), Ariz. R. Evid., 17A A.R.S., but he did not argue this ground below. Accordingly, he has forfeited his right to appellate relief on this ground absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (fundamental error review applies when defendant fails to object below); *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993) ("[A]n objection to the admission of evidence on one ground will not preserve issues relating to the admission of that evidence on other grounds.").

¶8 Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

"To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶9 "Except as provided in Rule 404(c) evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). "In general, the volunteered testimony of an officer, which indicates serious unrelated prior bad acts of the defendant that would otherwise be inadmissible, merits a mistrial." *State v. Smith*, 123 Ariz. 243, 250, 599 P.2d 199, 206 (1979).

¶10 After Yazzie testified regarding a hit-and-run, the state clarified on direct examination that there was no indication High-Elk had been involved in a hit-and-run. Therefore, the prior testimony concerning the hit-and-run was not of such magnitude that High-Elk could not have received a fair trial, nor did it prejudice him.

¶11 Phaneuf did not refer to a hit-and-run, although he did refer to a Circle K. Instead, he stated there had been "an accident." And the trial court struck his later comment that "the vehicle had been attempting to elude" other deputies, instructing the jury "not to consider" that testimony. Additionally, during final instructions, the court instructed the jury that it should not consider any testimony that had been stricken.

¶12 The testimony that there had been an accident did not imply that High-Elk had committed any "serious unrelated prior bad acts." *Id.* And the testimony that the vehicle was attempting to elude the deputies concerned the instant charges, not unrelated other acts,

and was consistent with voluminous other testimony. Additionally, we presume the jury followed the instructions. *See State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847, *cert. denied*, ___ U.S. ___, 127 S. Ct. 663 (2006); *see also State v. Miles*, 211 Ariz. 475, ¶ 22, 123 P.3d 669, 675 (App. 2005) ("[A]bsent any indication otherwise, we will not speculate on whether the jury considered stricken evidence."). Accordingly, there was no evidence properly before the jury suggesting High-Elk had committed any uncharged acts of misconduct. High-Elk fails to show fundamental error or prejudice.

¶13 High-Elk also contends the trial court erred by failing to give a curative instruction following Yazzie's statement regarding the hit-and-run. But although High-Elk's counsel initially stated that he wanted the court to give a cautionary instruction, he then stated he preferred the prosecutor's suggestion that she elicit testimony that Yazzie had no reason to believe High-Elk had been involved in a hit-and-run. When the trial court again asked if High-Elk's counsel wanted the court "to tell the jury anything else at this point," High-Elk's counsel responded, "No, your Honor." Thus, High-Elk invited any error in utilizing the prosecutor's suggested solution instead of a curative instruction and may not assign it as error on appeal. *See State v. Pandeli*, 215 Ariz. 514, ¶ 50, 161 P.3d 557, 571 (2007).

¶14 High-Elk next argues the trial court erred in denying his motion for judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S., because "[t]here was insufficient evidence that . . . High-Elk intended to assault the Sheriff's deputies" or that the

deputies were placed in reasonable apprehension of imminent physical injury. "We review a trial court's denial of a Rule 20 motion for an abuse of discretion and will reverse a conviction only if there is a complete absence of substantial evidence to support the charges." *State v. Carlos*, 199 Ariz. 273, ¶ 7, 17 P.3d 118, 121 (App. 2001). Substantial evidence is evidence that a reasonable jury could accept as sufficient to establish guilt beyond a reasonable doubt. *State v. Hall*, 204 Ariz. 442, ¶ 49, 65 P.3d 90, 102 (2003). We will affirm the trial court's ruling if reasonable minds could differ on inferences to be drawn from the evidence. *State v. Sullivan*, 205 Ariz. 285, ¶ 6, 69 P.3d 1006, 1008 (App. 2003).

¶15 To convict High-Elk of aggravated assault, the state had to prove that, using a dangerous instrument, A.R.S. § 13-1204(A)(2), High-Elk intentionally placed each deputy in "reasonable apprehension of imminent physical injury." A.R.S. § 13-1203(A)(2). "[A] defendant's intent to cause reasonable apprehension of imminent physical injury in the victim can be inferred from the evidence." *State v. Salman*, 182 Ariz. 359, 362, 897 P.2d 661, 664 (App. 1994); *see also State v. Lester*, 11 Ariz. App. 408, 411, 464 P.2d 995, 998 (1970) ("Proof of mental state is always difficult and almost invariably must be circumstantial in nature."). Similarly, "'[e]ither direct or circumstantial evidence may prove the victim's apprehension. There is no requirement that the victim testify to actual fright.'" *State v. Baldenegro*, 188 Ariz. 10, 13, 932 P.2d 275, 278 (App. 1996), *quoting State v. Wood*, 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994).

¶16 All three deputies testified that High-Elk had accelerated his vehicle toward them and that they had believed his car might hit their patrol cars. Yazzie testified that the car had passed within six inches of his patrol car's driver door and that he had been "scared." He got into his patrol car and closed the door after "judg[ing] that [High-Elk's car] was going to hit the door." Deputies Hill and Lamson both moved their patrol cars to avoid a collision. After being arrested, High-Elk was belligerent and told Phaneuf: "You're lucky I didn't kill you."

¶17 The jury could find that High-Elk had intended to place the deputies in reasonable apprehension of imminent physical injury in order to make them move out of his way and facilitate his escape. Evidence that he had accelerated directly toward the deputies and had not stopped despite the presence of the deputies' cars supports that inference. And although Phaneuf was not one of the deputies assaulted, High-Elk's statement that Phaneuf was lucky he did not kill him suggested High-Elk did not know that. The statement therefore could also support an inference of intent.

¶18 The jury could also find that each of the three deputies had, in fact, been placed in reasonable apprehension of imminent physical injury. One testified he was scared, and two others moved their vehicles to avoid being hit by High-Elk. It was for the jury to decide whether to draw the inference that the deputies were in reasonable apprehension of imminent physical injury. *See State v. Fontes*, 195 Ariz. 229, ¶ 10, 986 P.2d 897, 900 (App. 1998) ("A trial judge has no discretion to enter a judgment of acquittal if reasonable

minds could differ on the inferences to be drawn from the evidence; such a case must be submitted to the jury."). Accordingly, the trial court did not abuse its discretion in denying High-Elk's Rule 20 motion.

¶19 For the foregoing reasons, High-Elk's convictions and sentences are affirmed.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge